84246-9

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

NO. 35783-4-II

MARTIN MELLISH
Respondent

vs.

FROG MOUNTAIN PET CARE,
HAROLD ELYEA, JANE ELYEA
Appellants

and

JEFFERSON COUNTY
Respondent

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF WASHINGTON
FOR CLALLAM COUNTY
Cause Number: 07-2-00791-4

BRIEF OF RESPONDENT JEFFERSON COUNTY

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Date: October 7, 2008

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I. ASSIGNMENTS OF ERROR

NONE, because the Superior Court did not err when it concluded that the Land Use Petition of Respondent Martin Mellish was timely filed.

ISSUE: Whether a local government, such as Jefferson County, acts lawfully when it deems a written decision on an aggrieved party's Motion for Reconsideration to be the "land use decision" for the purposes of computing the Statute of Limitations found at RCW 36.70C.040(3) and RCW 36.70C.040(4)(a)?

II. STATEMENT OF THE CASE

Respondent Jefferson County does not disagree with Appellants' statements found in Section II.A ("Introduction"), Section II.B ("Facts") and Section II.C ("Procedure" and "Timeline"). However, two items must be added.

Respondent Jefferson County adds for the court's consideration and review an additional section of the Jefferson County Code (or "JCC") that is of great relevance to resolution of this appeal, specifically the code provision codified at JCC §18.40.340(1):

> "(1) Time to file Judicial Appeal. The applicant or any aggrieved party may appeal from the final decision of the administrator, hearing examiner or to a court of competent jurisdiction in a manner consistent with state law. **All appellants must timely exhaust all administrative**

remedies prior to filing a judicial appeal." (Emphasis supplied.)[1]

The timeline found at page 6 of the Appellants' Brief is accurate as are the computations of time, e.g., 50 days, found in Section II.C.

Secondly, the record below contains sworn testimony from D.W. Johnson, the County planner responsible for the Conditional Use Permit or Type III permit that Appellant Frog Mountain Pet Care ("FMPC") sought, that he considered the Ch. 36.70C RCW appeal filed by Respondent Mellish to have been filed before the applicable deadline. CP 216.

With respect to these two items the Court of Appeals is asked to take judicial notice of them in accordance with ER201(b) and ER201(d).

III. ARGUMENT

A. THE TRIAL COURT PROPERLY REJECTED THE APPELLANTS' MOTION TO DISMISS BECAUSE THERE WAS NO 'LAND USE DECISION' TO START THE 21 DAY STATUTE OF LIMITATIONS UNDER LUPA UNTIL JULY 21, 2007

The "land use decision" (a term of art in Ch. 36.70C RCW) that triggered the strict 21 days (plus 3 days for mailing) Statute of Limitations laid out in RCW 36.70C.040(3) and .040(4)(a) in this particular fact-pattern was the denial of the Motion for Reconsideration dated July 21, 2007. CP 232, 233. In that regard FMPC is incorrect in measuring the 24

[1] See Appendix F to the "Brief of Appellants" in this matter.

days from June 20, 2007 and that is why the trial court's decision to deny FMPC's motion to dismiss should be affirmed here.

Respondent makes such a statement because the July 21, 2007 decision is the only decision made by a County representative that fits the definition of "land use decision" as listed at RCW 36.70C.020(1)(a):

> "(1) "Land use decision" means a final determination by a local jurisdiction's body or officer with the highest level of authority to make the determination, including those with authority to hear appeals, on:
> (a) An application for a project permit or other governmental approval required by law before real property may be improved, developed, modified, sold, transferred, or used, ..." (Emphasis supplied.)

The County has established a never-challenged system in its development regulations where a person or entity aggrieved by a Hearing Examiner's decision on a Conditional Use Permit is authorized to ask that same Hearing Examiner to reconsider his or her decision. In that regard, see the Jefferson County Code at §18.40.310. In fact, the person or entity aggrieved by a Hearing Examiner's decision is required to exhaust all administrative remedies prior to filing a judicial appeal in order to comply with JCC §18.40.340(1).

Clearly, LUPA and its sister statutory scheme, the Regulatory Reform Act of 1995 now codified at Ch. 36.70B RCW, contemplate an internal County system where a person or entity aggrieved by a county's

permitting decision will have more than opportunity to plead their position before a County representative before they have no choice but to seek judicial relief in a manner consistent with Ch. 36.70C RCW. A two-part internal appeal system is authorized (but not required) by the text of RCW 36.70B.060(6) which allows a local government to create precisely such a two-step process, i.e., "one consolidated open record appeal," and at the county's option "a closed record appeal before a single decision-making body or officer." Given that Ch. 36.70B RCW approves of a local government establishing a "hearing and subsequent appeal" process before the matter (typically a disputed permit) becomes susceptible under LUPA of an appeal to the Superior Court, this County's decision to allow a Motion for Reconsideration is also lawful and, more importantly, creates the situation where only the decision on the Motion for Reconsideration constitutes a "land use decision" that starts the 24 day LUPA "clock" ticking down.

Nor does Ch. 36.70C RCW mandate what is or is not "a final determination by a local jurisdiction's body or officer with the highest level of authority to make the determination ..." Instead, the state law intentionally and wisely, the County would argue, is silent in this regard thereby providing local governments such as Jefferson County discretion to determine what is a "final determination" in their jurisdiction. Any

statewide mandate determining what constitutes "a final determination by a local jurisdiction's body or officer ..." would not only reduce local control but would presumably create a "one-size fits none" situation that would leave many, if not all, of the cities and counties of this state dissatisfied.

Within that statutory framework what occurred between the County, FMPC and Respondent Mellish regarding the finality of the permit issued on June 20, 2007 to Frog Mountain Pet Care was confusing and unfortunate since it gave rise to this litigation.

For example, the same section of the Jefferson County Code (JCC §18.40.310) that Respondent Mellish relied upon when asking the Hearing Examiner to reconsider his decision expressly states that it is a "final decision" that may be subject to a motion for reconsideration. FMPC relies upon that phrase "final decision" found in JCC §18.40.310 to argue that the Ch. 36.70C RCW Statute of Limitations begins and must be measured from that date. Why? Because, according to FMPC, the "final decision" is the "final land use determination" for the purposes of RCW 36.70C.020(1) and the permit, Appendix A to the Appellant's Brief, includes that express statement that any party aggrieved by issuance of this permit has 21 calendar days to seek a judicial remedy.

Such logic, however, completely ignores other text found in the Jefferson County Code at JCC §18.40.340(1), text that mandates a person or entity aggrieved by a decision of the County's Hearings Examiner must exhaust all administrative remedies before seeking judicial relief.

The trial court, when deciding the FMPC's motion to dismiss for lack of jurisdiction based on a late filing of the Land Use Petition, correctly determined that longstanding case law required him to interpret the applicable statutes (here County code provisions) in order to "discern and implement the legislative body's intent." CP 42. Based on the precedent entitled ***Tahoma Audubon Society v. Park Junction***, 128 Wn. App. 671, 682, 116 P. 3d 1046 (2005), the trial Judge correctly described step by step what case law required him to do when apparently contradictory or ambiguous statutes (here county codes) needed to be reconciled. Courts interpret ordinances using statutory construction principles. ***City of Spokane v. Douglass***, 115 Wash.2d 171, 177, 795 P.2d 693 (1990). The courts have ultimate authority to determine a statute's meaning and purpose. ***Postema v. Pollution Control Hearings Bd.***, 142 Wash.2d 68, 77, 11 P.3d 726 (2000).

When interpreting a statute, a court must discern and implement the legislature's intent. ***State v. J.P.***, 149 Wash.2d 444, 450, 69 P.3d 318 (2003). The mandate is to give effect to a statute's plain meaning.

McGinnis v. State, 152 Wash.2d 639, 645, 99 P.3d 1240 (2004). A court will derive plain meaning not only from the statute at hand, but also from related statutes disclosing legislative intent about the provision in question. ***Dep't of Ecology v. Campbell & Gwinn, L.L.C.,*** 146 Wash.2d 1, 11, 43 P.3d 4 (2002). Judges construe statutes to avoid strained or absurd results. ***Strain v. W. Travel, Inc.,*** 117 Wash.App. 251, 254, 70 P.3d 158 (2003), ***review denied***, 150 Wash.2d 1029, 82 P.3d 243 (2004).

When an agency is charged with the administration and interpretation of a statute, its interpretation of an ambiguous statute is accorded great weight in determining legislative intent. The legislative intent of the County is strongly indicated by the County's decision to inform Respondent Mellish that an appeal filed within 24 days of the date when his reconsideration motion was denied would be considered timely by the County (CP 251-253). Similarly, the County's legislative intent is indicated by the County's decision to join Mr. Mellish in opposing the procedural motion that the FMPC submitted in this matter alleging lack of subject-matter jurisdiction. See CP 213-236 and CP 237-241. The County might have remained silent on the procedural motion, harboring the hope that Mr. Mellish would have his LUPA Petition dismissed on procedural rather than substantive grounds. But that did not occur.

Furthermore, if the argument promulgated by FMPC is correct, then an aggrieved person or entity fighting a permitting decision within a county that had established locally a "hearing and subsequent appeal" process would be forced to immediately litigate on two fronts simultaneously. The aggrieved person or entity would be required to file a LUPA Petition AND simultaneously file the appeal papers with the local jurisdiction in order to request reconsideration. Suddenly, there would be two judicial or quasi-judicial matters concerning the same dispute going at the same time in different venues. That possible result defies logic and contravenes the public policy behind judicial economy. Various odd scenarios can be conceived of as arising from a requirement that there be simultaneous litigation, for example, either A) the Petition pursuant to Ch. 36.70C RCW becomes moot because the reconsideration motion is granted or B) the text of the Petition filed pursuant to Ch. 36.70C RCW becomes in whole or in part inaccurate because the decision on the motion for reconsideration altered one or more terms of the initial decision. The State Supreme Court considered those precise hypothetical situations in the context of SEPA in ***State v. Grays Harbor County***, 122 Wn. 2d 244 (1993) when it was asked to reconcile two seemingly contradictory ordinances from Grays Harbor County. Chief Justice Andersen concluded for a unanimous State Supreme Court that it would be:

> " ... cumbersome and force[s] a litigant to draft pleadings to challenge a non-final administrative decision. If the administrative appeal decision changed anything in the previous administrative*256 decision, the pleadings would have to be amended to reflect the later decision. In cases where the party seeking review of the SEPA issue prevailed in the administrative appeal, the court action may have been totally unnecessary. We conclude that for the County to force a party to seek judicial review of a nonfinal administrative decision would be unfair and wasteful of judicial resources." ***Id.*** at 255-256.

The logic of that decision applies equally here since it is the County's interpretation of its own code, which must be accorded great weight by the court, that the Ch. 36.70C RCW Statute of Limitations does not begin until the motion for reconsideration is resolved.

In sum, the trial court's conclusion that the Ch. 36.70C Petition of Respondent Mellish was filed timely is supported by case law, the interpretation provided to local codes by Jefferson County and public policy.

B. THE COUNTY IS ENTITLED TO STATUTORY ATTORNEY'S FEES IF THIS APPELLANT IS UNSUCCESSFUL

If this Court should conclude that Appellant FMPC's motion to dismiss for lack of subject-matter jurisdiction based on an allegedly untimely filing was properly rejected by the trial court, then the Respondent Jefferson County is entitled to statutory attorneys' fees under RCW 4.84.010(6).

IV. CONCLUSION

The trial court correctly ruled that Respondent Martin Mellish had timely invoked the subject-matter jurisdiction of the Superior Court of Clallam County in accordance with Ch. 36.70C RCW and that decision below should be affirmed by this court.

Respectfully submitted this 7th day of OCTOBER, 2008

JUELANNE DALZELL, Jefferson County
Prosecuting Attorney

David W. Alvarez

By: **DAVID W. ALVAREZ**, WSBA #29194
Chief Civil Deputy Prosecuting Attorney

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No.: 07-2-00791-4

DECLARATION OF MAILING

Janice N. Chadbourne declares:

That at all times mentioned herein I was over 18 years of age and a citizen of the United States; that on the 7th day of October, 2008, I mailed, postage prepaid, a copy of the **BRIEF OF RESPONDENT JEFFERSON COUNTY** to the following:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing declaration is true and correct.

Dated this 7th day of October, 2008, at Port Townsend, Washington.

Janice N. Chadbourne
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